No. 97-1929

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The issue presented here is whether Respondent Confederated Salish and Kootenai Tribes [Tribes] have the inherent authority to regulate Petitioners' fee land wastewater discharge activities and thereby condition the latter's ability to secure National Pollution Discharge and Elimination System permits on compliance with tribal water quality standards. Respondent Environmental Protection Agency [EPA] found such authority in concluding that the Tribes should be treated as a State under § 518 of the Clean Water Act [CWA]. 33 U.S.C. § 1377 (Pet. 130a). EPA defended its decision before the lower courts on the basis of its interpretation of federal common law, and its suggestion that this issue was not presented below is unaccountable if only because that was precisely the question resolved by the Court of Appeals.

More understandable is EPA's shift in litigation position that attempts to recast the issue from whether the Tribes have the requisite inherent authority to whether the agency properly "looked to" this Court's inherent authority precedent in "reasonably" construing § 518. (Br. Fed. Resp't Opp'n [Fed. Opp'n] at 18, 20.) EPA has changed position because its prior one is untenable. The important question concerning the scope of an Indian tribe's inherent authority that *was* litigated below and *was* decided by the Court of Appeals should be resolved now by this Court.

ARGUMENT

I. THE ISSUE IN THIS CASE IS THE SCOPE OF INHERENT TRIBAL AUTHORITY AND EPA'S MISAPPLICATION OF THE STANDARDS THAT DETERMINE SUCH AUTHORITY.

EPA's initial contention that "the petition seeks review of an issue that was not briefed or decided below"

(Fed. Opp'n at 10) is simply wrong. Petitioners' formulation of the question presented makes clear that the entities over which tribal authority is asserted are a State and several of its political subdivisions. The question's phrasing is squarely consistent with the issue litigated and decided below – i.e., whether the Tribes' inherent powers extended to regulation of Petitioners' discharge activities from lands owned by them. Aside from being governmental entities, Petitioners are also nonmembers, and the question presented thus necessarily includes the antecedent question of whether the Tribes' inherent authority extends to *any* nonmember. Were the issue different, the Court of Appeals would not have defined the controversy as one over "the scope of inherent tribal authority" (Pet. 11a) and then resolved the dispute by reference to its interpretation of the second exception in *Montana v. United States*, 450 U.S. 544, 566 (1981), *id.*, 9a-13a.

EPA's related argument that Petitioners did not raise the distinction between individual nonmembers and governmental entities below is likewise incorrect. (Fed. Opp'n at 13 n.2.) Petitioners clearly maintained that their governmental status is material to the question whether the second *Montana* exception should be construed to permit their regulation by the Tribes. (Appellants' Open. Br. at 39-40; Appellants' Reply Br. at 8-9.) EPA further specifically acknowledged before the Court of Appeals that "the State raised this issue in its complaint." (Fed. Appellees' Br. at 42 n.20.) That the Court of Appeals failed to discuss this issue presumably meant only that it concluded the status of the regulated entity was irrelevant under its broad-brush application of *Montana*.

II. EPA'S REVISED POSITION ON THE MERITS IS INCONSISTENT WITH ITS 1991 REGULATIONS AND THE STRUCTURE OF THE CWA.

In an effort to divert focus from the inherent authority question and to portray this matter as involving little more than a "technical regulatory issue" (Fed. Opp'n at

20; *see also* Resp. Confed. Salish & Kootenai Tribes' Opp'n [Tribes' Opp'n] at 4-5), EPA makes an important shift in position. EPA now contends that, in enacting § 518, Congress authorized it to confer CWA program responsibilities on tribes with respect to all lands within an Indian reservation (Fed. Opp'n at 13, 20; *see also* Tribes' Opp'n at 6 n.4) and that, in exercising such authority, the agency decided it would look to this Court's case law for "guidance." (Fed. Opp'n at 14; *see also id.* at 10 ("benchmark"); *id.* at 20 ("guidance"). With this new argument EPA apparently suggests that the source of regulatory authority being exercised by a tribe when acting as a "State" under § 518 is something *other* than its inherent authority. Since tribal authority must be either delegated or inherent, EPA effectively asserts it is the former, not the latter, under § 518. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195-96, 208 (1978). This new theory is unavailing for at least two reasons.

First, EPA's fresh position flatly contradicts its prior writings on the subject. In the 1991 rulemaking that lies at the heart of this case, EPA concluded that § 518(e) was ambiguous and that

> Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of federal Indian law.

(Pet. 111a.) That the Court of Appeals viewed inherent authority as the dispositive question accordingly was to be expected, since EPA maintained consistently before the lower courts that such authority was a condition precedent to "State" status under § 518. (Fed. Appellees' Br. at 25-26) ("Because it determined that Congress had not clearly delegated to tribes federal authority over the activities of nonmembers in section 518, EPA determined that it would require tribes to demonstrate inherent authority to be eligible for approval of a reservation-wide water quality standards program"). The agency cannot

now change that administrative interpretation and the very basis for the challenge to its treatment-as-a-State determination. *See, e.g., Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 651-52 (1990); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n.31 (1980).

Second, EPA's 1991 interpretation of § 518 is consistent with the overall structure of the CWA, while its newly-coined view is not. No provision of the CWA *delegates* authority to States. The CWA instead merely authorizes EPA to grant regulatory primacy to States by deferring the exercise of federal power. *See, e.g., California v. United States Dep't of Navy*, 845 F.2d 222, 225 (9th Cir. 1988) ("[S]tate permit programs [under CWA] are 'not a delegation of Federal authority,' but instead are state programs which 'function[ ] in lieu of the Federal program' " (quoting H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977), 1977 U.S.C.C.A.N. 4327, 4479)); *cf. United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (penalties assessed under an EPA-approved state NPDES program do not "arise under" federal law). Thus, interpreting § 518(e) to expand the scope of tribal authority through legislative mandate would treat tribes very *differently* from, and not as, "a State." Just as it is unlikely that Congress would have made "a change as important as an expansion of Indian authority to regulate nonmembers" (Pet. 111a) without doing so "through statutory language and discuss[ing] the change in the committee reports" (*id.*), so too it is unlikely that Congress would alter the structure of the CWA through silence or by implication.

III. EPA DOES NOT EXPLAIN HOW AN INDIAN TRIBE'S SOVEREIGN INTERESTS CAN BE JEOPARDIZED BY NONMEMBER ACTIVITIES THAT ARE EFFECTIVELY REGULATED BY THE STATES OR THE FEDERAL GOVERNMENT.

In an effort to cast Petitioners' position as extreme, EPA quotes the Court of Appeals for the proposition that

"Petitioners have specifically argued that '[*Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)] effectively repudiated the *Montana* standard.' " (Fed. Opp'n at 12, *quoting* Pet. 10a-11a.) Petitioners, however, never suggested that *Brendale* "repudiated" *Montana*. They instead argued that the second *Montana* exception does not apply where nontribal remedies exist to address the alleged infringement of a protectable federal interest. Petitioners' position in this regard is grounded in *Montana* itself (450 U.S. at 566 n.16) and in Justice White's plurality opinion in *Brendale*. 492 U.S. at 430-31; *see also id.* at 460 (Blackmun, J., concurring in part & dissenting in part) ("Justice White's opinion fashions a new-fangled federal nuisance-type cause of action").

This Court's decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), which was issued after regular briefing had concluded before the Court of Appeals, merely confirmed Petitioners' understanding of the second exception. *Strate* unequivocally teaches that where nonpreempted state remedies exist, the "optional use" (117 S. Ct. at 1416) of tribal law is unnecessary to protect a tribe's ability to govern itself or to order its internal affairs. This result, of course, obviates the need to resort to the drastic step of allowing an Indian tribe to exercise nonconsensual authority over the conduct of persons who are unable to participate as a matter of right in tribal political processes. *See, e.g., Duro v. Reina*, 495 U.S. 676, 694 (1990); (*see also* Br. Amici National Water Resources Ass'n et al. at 17.) More important from Petitioners' standpoint, such a result also obviates the need to take the startling and unprecedented step of countenancing extra-constitutional tribal regulatory powers over a State and its political subdivisions – a point Respondents declined to address.

IV. THIS CASE DOES NOT TURN ON FACTS SPECIFIC TO THE FLATHEAD RESERVATION BECAUSE EPA'S *"MONTANA* TEST" IS SO DILUTED AS TO ENCOMPASS ANY INDIAN RESERVATION WHERE WATERS SUBJECT TO REGULATION UNDER THE CWA EXIST.

EPA next asserts that this case is not appropriate for review because it is narrowly based on a detailed and specific set of facts. (Fed. Opp'n at 19-20.) In so arguing, EPA fails to identify for the benefit of the Court what facts could be proven that would yield a finding under its "interim operating rule" that a tribe ever lacks inherent authority. That is because under EPA's approach no such facts exist.[1]

The striking breadth of EPA's vision of what justifies application of the second exception to *Montana*'s "main rule" (*Strate*, 117 S. Ct. at 1413) is reflected in the fact that EPA does not even require *actual* threats to a tribe's health or welfare. Instead, EPA asserts that the mere *possibility* of such effects is sufficient. The agency's "*Montana*-Test Guidance" document thus asks whether "[i]f no pollution is presently being produced, [there are] circumstances showing that new pollution sources *may be established in the future* [since] [t]he threat of such impacts is a reasonable basis for a tribal government to establish controls intended to prevent harm from occurring in the first

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[1] EPA's attempt to shift the blame to Petitioners is disingenuous. (Fed. Opp'n at 12 n.1; *id.* at 19.) It first asks the Court to presume that there are facts which Petitioners could have proven that would have made a difference when, for reasons discussed in the text, there clearly are none. Secondly, in so arguing EPA also fails to mention that many of the facts upon which EPA purported to rest its decision – facts which Petitioners apparently were required to disprove – were assembled by EPA *after* Petitioners had submitted their response and were not brought to Petitioners' attention. (A.R., Vol. II, Tabs 25, 30, 31.)

place." (Br. Amici States of Arizona et al. at 29a-30a) (emphasis added); (*see also* Pet. 63a) ("the State submittal should have presented any available data demonstrating that impairment of waters by activities on fee lands would not have potential effects on the health and welfare of the Tribes").[2]

Because EPA's "operating rule" is applicable in essentially all situations where "waters of the United States" are present on an Indian reservation, its contention that it decides TAS applications "on a Tribe-by-Tribe basis" is a red herring. (Fed. Opp'n at 19.) Since the same "generalized findings" will apply to each tribe and since EPA will always be- able to determine that there are jurisdictional waters on the reservation used by tribal members – and thus that there is the potential of future harm – EPA will always reach the same conclusion. It makes no difference whether each TAS application is decided separately or whether "EPA conducts a careful inquiry into the particular water resources and land-ownership patterns on each reservation" (*id.*), if the result in all cases is identical.

Lastly, whatever might be said about EPA's approach, there is little in the Court of Appeals' analysis indicating that its holding is factually limited. Although the court mentioned EPA's factual appendix in its introductory discussion (Pet. 8a-9a), it is hardly clear that those facts limit the decision's scope. In the critical portion of its opinion, the only "facts" the Court of Appeals discussed were that the nonmember "conduct . . . involves the tribe's water

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[2] On this point, less than a month ago EPA argued to a Montana federal district court that "neither EPA's regulations nor the Ninth Circuit's decision . . . require a showing of actual on-going nonmember-caused harm to clean water as a prerequisite to TAS status. Rather, *potential harms are sufficient.*" (EPA's Resp. Mem. at 5-6), *State of Montana v. United States EPA*, No. CV-97-49-BLG-JDS (D. Mont. Aug. 11, 1998 emphasis added); (Reply Br. at 7a).

rights" (Pet. 12a) and the axiom that "[a] water system is a unitary resource" (*id.*). Under the Court of Appeals' reasoning, as under EPA's 1991 rulemaking, if the non-member activity involves or affects water on the reservation, tribal authority under the second *Montana* exception necessarily follows. (Pet. 12a.)[3]

V. EPA'S SUGGESTIONS THAT THE COURT OF APPEALS' DECISION HAS LIMITED PRECEDENTIAL VALUE AND THAT THIS COURT SHOULD AWAIT A CONFLICT MERELY TEMPORIZE.

EPA lastly argues that "this case has limited precedential value outside of [this] specific regulatory context." (Fed. Opp'n at 20.) Neither EPA nor the Tribes have contested the scope of treatment-as-State activity reflected in the appendix to the petition. (*See* Pet. 135a-146a.) Consequently, even within its "specific regulatory context," the impact of the Court of Appeals' decision is quite significant. The Tribes' related argument that, at present, any direct regulation of Petitioners' activities will be filtered through EPA (Tribes' Opp'n at 7; *see also* Fed. Opp'n at 12-13) does not diminish the immediacy of their regulatory powers, since "EPA will not issue an NPDES permit [to Petitioners] if the CSK Tribes deny certification." (Fed. Opp'n at 8.) The Tribes' argument also mischaracterizes the issue, which is not the

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[3] On this point, less than two weeks ago EPA argued to a Montana federal district court:

> [T]here is nothing in the Ninth Circuit's decision in the Flathead case to suggest that the court considered the facts of that case to constitute the minimum standard against which all future cases of this nature will be judged. Indeed, the court hardly discussed the facts of the Flathead case at all.

(EPA Reply Mem. at 3), *State of Montana v. United States EPA*, No. CV-97-49-BLG-JDS (D. Mont. Aug. 24, 1998); (Reply Br. at 14a).

directness or indirectness of tribal regulation but rather whether the Tribes are entitled to treatment-as-State status in the first place.

Moreover, the notion that the Court of Appeals' decision has limited precedential value is not credible. The court expressly viewed this case as presenting a general question of inherent authority under *Montana*. (Pet. 9a-10a.)[4] EPA's own effort to support the decision below implicitly admits that fact in its reliance on *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1023 (8th Cir.), *cert. denied*, 118 S. Ct. 64 (1997). (Fed. Opp'n at 16.) It is also clear from EPA's recent arguments to the Montana federal district court (*see supra* notes 2 and 3), and from the fact it has decided to extend "generalized findings" to environmental programs involving other regulated media (Br. Amici States at 21a), that EPA intends to apply the Court of Appeals' decision broadly.

Finally, EPA's suggestion that this Court should await an explicit conflict to develop (Fed. Opp'n at 18-19) is unfair to the Petitioners and their nonmember constituents – and others in the Ninth Circuit who are similarly situated – who will be required in the interim to comply with tribal standards and potentially to make irretrievable commitments of resources as a consequence. Given the ongoing and unavoidable responsibilities that Petitioners have to provide water, sewer, and other public works, a timely answer to this question is imperative. (*See* Mot. Leave File Amicus Curiae Br., National Water Resources Ass'n, et al. "The development of policies and

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[4] Petitioners did not discuss *City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir.), *cert. denied*, 118 S. Ct. 410 (1997), in the petition because that decision did not deal with the question of inherent tribal authority over nonmembers under the second *Montana* exception. *City of Albuquerque* has no bearing on this case.

projects to meet future needs requires a degree of certainty about regulatory regimes so that meaningful planning, in terms of legal and financial support for developments as well as engineering, can take place.") EPA's deferral suggestion also belittles the quite remarkable federalism concerns raised by the lower courts' blithe endorsement of tribal regulatory powers over a State and its political subdivisions. The petition presents a straightforward legal question involving primarily the proper reading of this Court's prior opinions and which will not benefit from additional consideration by the lower courts. That question has immediate and wide-ranging practical significance and should be answered definitively now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE UNITED STATES DISTRICT COURT
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STATE OF MONTANA, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants, and ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, Defendant-Intervener.	CV-97-49-BLG-JDS EPA'S RESPONSE MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

As the Court is aware, this case is the second attempt by the State of Montana to challenge a decision by the United States Environmental Protection Agency ["EPA"] to allow Indian tribes to set water quality standards within their respective reservations. In this case, EPA determined that the application of the Assiniboine and Sioux Tribes of the Fort Peck Reservation meets the criteria of § 518(e) of the Clean Water Act ("CWA"), 33 U.S.C.

§ 1377(e), and that the Tribes may set water quality standards within the Fort Peck Reservation pursuant to the CWA.

In Montana's first challenge to an EPA determination that a tribe may set water quality standards within its reservation, the Ninth Circuit upheld EPA's interpretation of federal case law delineating the extent of tribal authority over nonmember activities occurring on a tribe's reservation. *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *petition for cert. filed*, 97 U.S.L.W. 1929 (U.S. June 10, 1998) (No. 97-1929) [hereinafter "the Flathead TAS case"]. The Ninth Circuit also reviewed and upheld EPA regulations governing the requisite factual showing necessary for a tribe to be granted treatment-in-the-same-manner-as-a-state status ["TAS status"] pursuant to the CWA. *Id.* at 1141.

In Montana's present challenge to EPA's determination that the Fort Peck Tribes qualify to set water quality standards for all surface waters within the boundaries of their reservation, Montana makes two arguments. Their first argument is that because both the state and federal governments have authority to implement the CWA with respect to nonmembers within the Fort Peck Reservation, the Tribes then lack the authority to do the same. Their second argument is that EPA's decision was arbitrary because there was not a sufficient factual basis to determine that the Fort Peck Tribes qualify to implement a water quality standards program under the CWA. Montana asserts that the Administrative Record does not reflect the existence of an actual threat posed by nonmember activities.

Both of these arguments are flawed. No federal court has ever premised the existence of tribal authority over nonmembers on the lack of authority by either a state or the federal government. Additionally, EPA's determination in this case is amply supported by the Administrative Record, and consistent with the Ninth Circuit's decision in the Flathead TAS case.

ARGUMENT

A. THE EXERCISE OF TRIBAL CIVIL AUTHORITY OVER NONMEMBER ACTIVITY DOES NOT DEPEND UPON WHETHER ANOTHER SOVEREIGN MAY EXERCISE AUTHORITY OVER THE SAME ACTIVITY.

The exercise of tribal civil regulatory authority over nonmembers does not depend upon whether another sovereign has authority over the same activity, but upon whether, in this case, the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 556 (1981). This is the second, and applicable, prong of the "*Montana* test" which is the inquiry to determine when a tribe has retained the inherent sovereign powers to exercise civil jurisdiction over nonmembers on fee lands within a tribe's reservation. *Id.*

After applying this test, the Ninth Circuit held in the Flathead TAS case that a tribe can exercise "inherent Tribal regulatory authority over nonconsenting nonmembers" for the purpose of developing a water quality standards program under the CWA. *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998). The Ninth Circuit found, as

long as certain factual elements are present, that regulating the quality of water on a reservation passes the *Montana* test because:

> due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."

Id. (citations omitted). The Ninth Circuit specifically held that EPA's decision was consistent with the Supreme Court's decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). 137 F.3d at 1141.

Montana now argues that this Court should read the *Strate* decision to bar tribal jurisdiction except where no federal or state protection exists. *Strate* does not support Montana's theory.

In *Strate*, the Court held that the tribal court in the case did not have jurisdiction over a tort claim between two nonmembers who were in a traffic accident on a state highway within the reservation. *Id.* at 1414. The Court applied the *Montana* test and held that the conduct between the two nonmembers on a highway that the tribe had not reserved a right to control did not threaten the self-governance of the tribe. *Id.* The Court did not base its decision, nor did it mention as a line of inquiry, the fact that another court had jurisdiction over the accident. *See id.* In essence, Montana is arguing for the Court to add a new prong to the *"Montana test"* that would preclude

tribal jurisdiction over nonmembers in virtually all circumstances where state or federal jurisdiction exists.

This argument was specifically rejected by the Ninth Circuit in the Flathead TAS case. 137 F.3d 1141 ("there is no suggestion [by the Supreme Court] that inherent authority exists only when no other government can act"). Nor has any other federal court decision dealing with a tribe's assertion of authority over nonmembers explored as a line of relevant inquiry whether some other sovereign could assert jurisdiction over the same conduct that the tribe sought to assert jurisdiction.

Because the absence of jurisdiction by another sovereign is not a prerequisite to the assertion of jurisdiction by a tribe over nonmembers, Montana's contrary argument should be rejected and EPA's decision should be upheld.

B. EPA'S DECISION IN THIS CASE IS AMPLY SUPPORTED BY THE ADMINISTRATIVE RECORD

As we have shown, the Administrative Record in this case fully supports EPA's decision to grant the Tribe's TAS application. *See* EPA Memorandum In Support of Motion for Summary Judgment, pp. 15-20. EPA correctly determined that nonmember activity on fee lands may cause serious and substantial impacts on the health and welfare of the Tribes. *See id.*

Montana asserts that EPA's determination cannot be upheld, arguing that the Administrative Record does not reflect an actual nonmember-caused threat to the Tribes'

interest in clean water. However, neither EPA's regulations nor the Ninth Circuit's decision in the Flathead case require a showing of actual on-going nonmember-caused harm to clean water as a prerequisite to TAS status. Rather, potential harms are sufficient. *See* 137 F.3d at 1139-40. *See also Montana v. United States,* 450 U.S. at 566 (threats to tribal health and welfare satisfy the *Montana* test).

Moreover, Montana's argument is inconsistent with the CWA's goal of eliminating water pollution. If the Court were to adopt Montana's reasoning, the Tribes could only regulate the quality of water on or adjacent to fee lands after a nonmember had begun discharging pollutants into the water from the lands. If the nonmembers activities then ceased, the Tribes would lose jurisdiction because there would no longer be an actual discharge of pollutants. Such an interpretation would be inconsistent with the CWA's express goal of eliminating all discharges to surface waters. *See* 33 U.S.C. § 1251(A)(1).

Montana cites three post-*Strate* Ninth Circuit decisions in support of this argument. Two of these decisions address whether tribal courts can assert jurisdiction in tort cases involving nonmembers. *County of Lewis v. Allen,* 141 F.3d 1385 (9th Cir. 1998); *Wilson v. Marchington,* 127 F.3d 805 (9th Cir. 1998), *cert. denied,* 118 S. Ct. 1516 (1998). The third case involves a tribal court interpreting the Montana State Constitution and then issuing an injunction against Yellowstone County prohibiting it from taxing fee land within a reservation. *Yellowstone County v. Pease,* 96 F.3d 1169 (9th Cir. 1997), *cert. denied,* 117 S. Ct. 1691 (1997).

While these decisions do find that tribes may lack jurisdiction over nonmembers in certain unrelated contexts, none of these decisions interprets a tribe's authority over nonmembers for the purposes of developing a water quality standards program under the CWA, nor for any other purpose directly related to the health and welfare of the reservation population. The Flathead TAS case did interpret tribal authority in this context, and EPA's decision in this case is consistent with the court's decision in that case.

In the Flathead TAS case, the Ninth Circuit noted that potential activities on fee lands, including agricultural activities, could impact tribal water quality. 137 F.3d at 1139-40. The court specifically reasoned that, due to the mobile nature of pollutants in the surface water, it would be difficult to separate the effects of water quality impairment from fee lands with those on member-owned lands. *Id.* at 1141. Thus, pursuant to the Ninth Circuit's opinion, EPA may base its decision on potential impacts.

In this case, EPA specifically determined that tribal water quality was impaired and found in its professional judgment that, due to the nature of land-ownership and hydrology on the Reservation, it is very likely that activities on fee lands cause or contribute to such impairment. *See* EPA's Memorandum In Support of Motion for Summary Judgment, p. 18; A.R. Tab 30 at A-5. Consistent with the *Montana* test, neither EPA's regulations nor the Ninth Circuit's decision in the Flathead TAS case require more. Therefore, EPA's decision is amply supported by the Administrative Record and it should be upheld. *See id.*, pp. 15-20.

CONCLUSION

For the reasons stated above, this Court should deny plaintiff's motion for summary judgment.

Respectfully submitted,

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I hereby certify that I caused a true and accurate copy of the foregoing Response Memorandum to Plaintiff's Motion for Summary Judgment to be mailed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

STATE OF MONTANA, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, DEFENDANT-INTERVENOR.	CV-97-49-BLG-JDS REPLY MEMORANDUM IN SUPPORT OF EPA'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

We previously demonstrated that EPA's decision to approve the Fort Peck Tribes application under section 518(e) of the Clean Water Act ("CWA"), 33 U.S.C. § 1377(e), to develop a water quality standards program for all surface waters on the Fort Peck Reservation under CWA section 303, 33 U.S.C. § 1313, should be upheld, and that Montana's arguments to the contrary have no merit. *See* Memorandum in Support of EPA's Motion for Summary Judgment; EPA's Response Memorandum to Plaintiff's Motion for Summary Judgment. We showed that the

regulations under which EPA made its decision here were expressly upheld by the Ninth Circuit in *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *petition for cert. filed*, 97 U.S.L.W. 1929 (U.S. June 10, 1998) (No. 97-1929) ("the Flathead case"), and that EPA's Administrative Record amply supports its decision in this case. *See id.*

In response, Montana argues that the Ninth Circuit's decision does not preclude it from challenging the factual basis for EPA's decision in this case. Plaintiff's Response Brief at 2-3. It then argues, as it did in its opening brief, that the Administrative Record in this case is insufficient because it does not contain the "critical facts" that were necessary for the Ninth Circuit's decision in the Flathead case. *Id.* However, while Montana may challenge the factual basis for EPA's decision in this case, as we have shown, and as is further shown below, its arguments fall wide of the mark. Accordingly, EPA's motion for summary judgment should be granted.

ARGUMENT

The Administrative Record Supports EPA's Decision in this Case.

Montana asserts that the Ninth Circuit's decision in the Flathead case was based upon the "critical" facts that point source discharges on fee lands were actually causing water quality impairment on tribal lands. Plaintiff's Response Brief at 3.[1] We have already shown that this

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[1] Montana's apparent contention that there must be point source discharges from fee lands before EPA may grant a tribal application under CWA section 518(e) is inconsistent with the

argument lacks merit. *See* EPA's Response Memorandum to Plaintiff's Motion for Summary Judgment at 5-7. Accordingly, our arguments here are brief.

Contrary to Montana's assertion, there is nothing in the Ninth Circuit's decision in the Flathead case to suggest that the court considered the facts of that case to constitute the minimum standard against which all future cases of this nature will be judged. Indeed, the court hardly discussed the facts of the Flathead case at all. *See Montana v. EPA*, 137 F.3d at 1139-40. Moreover, the court specifically included potential water quality impairment from potential sources in its brief discussion of the factual basis for EPA's decision. *See id.*[2] Accordingly, Montana is

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CWA. Water quality standards adopted under CWA section 303(c) are ambient standards which govern the contribution of pollutants from all sources, both point and non-point. Under CWA section 319, states and authorized tribes may adopt best management practices to control non-point sources in order to meet water quality standards. *See* 33 U.S.C. § 1329. States and authorized tribes may also establish controls on non-point sources to implement section 303(d), 33 U.S.C. § 1313(d), which generally requires that total maximum daily loads ("TMDLs") be developed where water quality standards are not being achieved. TMDLs include the identification of controls on both point source and non-point source discharges. 40 C.F.R. § 130.2(i). Thus, it was appropriate for EPA to consider impacts from non-point sources in this case. *See* Memorandum in Support of EPA's Motion for Summary Judgment at 15-20.

[2] The Ninth Circuit also focused upon potential impacts from nonmembers to a reservation's water quality when applying the *Montana* test in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982). Thus, the consistent case law in this Circuit is that potential impacts may be considered under the *Montana* test.

wrong in its assertion that the Flathead case requires there to be actual point source discharges from fee lands which are actually impairing tribal waters before EPA can grant a tribal application for authority to develop a water quality standards program under CWA section 518(e).[3]

In fact, the primary holding in the Flathead case is that EPA's regulations, under which both its decision there and its decision here were made, "are valid as reflecting the appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers." *Montana v. EPA*, 137 F.3d at 1141. EPA's regulations allow a tribe to demonstrate either potential or actual impacts, provided that the impacts be serious and substantial. *See* 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (middle column). Thus, the regulations do not require that actual impacts must be occurring from fee lands before it can grant a tribal application. Therefore, it was reasonable for the Tribes to request authority to set water quality standards in order to protect themselves from potential as well as actual impacts, and it was likewise reasonable for EPA to consider all such impacts when it reviewed the Tribes' application.

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[3] Montana's argument that there must be actual impacts before a tribe may have authority to set water quality standards is also inconsistent with the Supreme Court's formulation of the *Montana* test: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct *threatens or* has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981) (emphasis added).

At bottom, the question presented here is whether it was arbitrary and capricious for EPA to grant the Fort Peck Tribes' application, giving due deference to EPA's factual determinations regarding all the relevant impacts. *See* Memorandum in Support of EPA's Motion for Summary Judgment at 10-11. We previously showed that it was not, and that EPA correctly considered the ample evidence in the Administrative Record regarding water quality impacts when it approved the Tribes' application. *See* Memorandum in Support of EPA's Motion for Summary Judgment at 15-20. Accordingly, EPA's motion for summary judgment should be granted.[4]

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[4] The Fort Peck Tribes argue that section 518(e) is a direct delegation of authority for approved tribes to regulate water quality for all sources within the exterior boundaries of the reservation. At the time EPA promulgated its water quality standards regulations, EPA declined to construe CWA section 518(e) as a direct delegation of authority to tribes over all reservation water pollution sources. 56 Fed. Reg. at 64,879-80. However, in its decision document, EPA also recognized that to the extent the Tribes' position is correct, it would provide additional support for EPA's determination in this case. AR Tab 30 at 8.

CONCLUSION

For all these reasons, as well as those stated in EPA's previous memoranda, EPA's motion for summary judgment should be granted.

Respectfully submitted,

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